PERDANA MERCHANT BANKERS BHD

v.

MARIL-RIONEBEL (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CASE NO: D4-28-39-1994]
28 DECEMBER 2004

CIVIL PROCEDURE: *Action - Reinstatement - Application to set aside winding-up order that was made inter partes and affirmed on appeal - Whether an abuse of process of court*

This was an application by the respondent to reinstate encl. 229, which was the respondent's application styled as a notice of motion to set aside an order dated 14 November 2000 ordering the respondent to be wound-up. The winding-up order of 14 November 2000 was an *inter partes* order that had been affirmed on appeal by the Court of Appeal and, subsequently, the Federal Court. The one issue requiring determination was whether this court ought to exercise its discretion to reinstate encl. 229.

Held (dismissing the application):

[1] The proceedings here had been fully and finally adjudicated upon by the highest court in the country, namely, the Federal Court. The correctness of the winding-up order of 14 November 2000 had been fully litigated and could no longer be challenged by the respondent through encl. 229. The attempt in encl. 229 to have a second bite at the cherry, so to speak, after all the appeals had been exhausted was a classic example of an abuse of the process of the court. (pp 394 g-h & 395 a-b)

Case(s) referred to:

Castro v. Murray [1875] 10 Ex 213 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Hewlett Packard Sales (Malaysia) Sdn Bhd v. Active Team Mould Engineering Sdn Bhd & Ors [2003] 5 CLJ 167 HC ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Parasuraman Kuppan v. Sazali Md Akhir & Anor [1999] 4 CLJ 1 CA ***(dist)***
Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd [1996] 5 MLJ 127 ***(dist)***
Raphael Pura v. Insas Bhd & Anor [2003] 1 CLJ 61 FC ***(refd)***

Spring Grove Services Ltd v. Deane [1972] 116 SJ 844 ***(refd)***
Stephenson v. Garrett [1898] 1 QB 677 ***(refd)***
Willis v. Earl Beauchamp [1886] 11 P 59 ***(refd)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd [1975] AC 581 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 8

For the petitioner - Sean Yeow Huang Meng; M/s Lee Hishammuddin
For the respondent - Jayaratnam K; M/s Jayaraman, Ong & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

This case is a classic example of an abuse of the process of the court. Vexatious and oppressive use of the courts are considered as an abuse of the process of the court. There must be a *bona fide* usage of the process of the court. The process of the court must not be abused. The court, exercising its inherent jurisdiction, will prevent the improper use of its machinery (*Castro v. Murray* [1875] 10 Ex. 213; and *Willis v. Earl Beauchamp* [1886] 11 P. 59).

It is not difficult to itemise the examples of an abuse of the process of the court. Thus, if a party litigates a case, once again, over an identical question which has been decided against him even though the matter is not strictly res judicata, it is said to be an abuse of the process of the court (*Stephenson v. Garrett* [1898] 1 QB 677 CA; and *Spring Grove Services Ltd. v. Deane* [1972] 116 SJ 844). It is also an abuse of the process of the court to raise matters, in subsequent proceedings, which could and should have been raised and litigated in earlier proceedings (*Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581).

With this brief discourse into the law, I will now proceed to the heart of the matter.

Enclosure 255

Now, encl. 255 is the respondent's application to re-instate its notice of motion dated 7 September 2001 bearing enclosure number 229. Enclosure 229 is the respondent's application styled as a notice of motion to set aside the Order of 14 November 2000. The Order dated 14 November 2000 is a crucial Order as it ordered the respondent to be wound-up. The Order of 14 November 2000 is reflected at encl. 221.

Enclosure 229 was struck out by this court on 19 September 2002 after the respondent's application for an adjournment was refused and counsel mentioning on behalf of the respondent made no submission whatsoever. The Order of 19 September 2002 is seen at encl. 256.

The Sole Issue

There is one issue. It is this. Whether this court ought to exercise its discretion to re-instate encl. 229?

Decision Of The Court

The respondent argues that the merits of encl. 229 ought to be argued at the hearing of encl. 229 itself in the event this court exercises its discretion to re-instate encl. 229. The respondent further argues that the notice of motion in encl. 229 was struck out on 19 September 2002 as counsel for the respondent was unable to attend court. The petitioner, by way of a rebuttal, points out that there was counsel in attendance who was mentioning on behalf of the respondent on 19 September 2002 but that counsel made no submission whatsoever. Indeed it is the duty of counsel in attendance to submit to the court in order to assist the court in its deliberation.

Now, having considered the submissions of the parties, it is my judgment that I should not re-instate encl. 229 and that I should dismiss encl. 255 with costs. Standing alone encl. 229 is wholly devoid of any merits. The chequered history to encl. 255 compels me to arrive at this decision.

Enclosure 229 seeks to set aside the winding-up order of 14 November 2000 which was made *inter partes* and was subsequently affirmed on appeal. The respondent appealed against the winding-up order of 14 November 2000 which it now seeks to set aside. This appeal was dismissed by the Court of Appeal on 5 April 2001 (see exhibit marked as "R1" of encl. 238). Aggrieved by the decision of the Court of Appeal, the respondent filed an application to the Federal Court for leave to appeal against the decision of the Court of Appeal in dismissing its appeal. The Federal Court dismissed the respondent's application on 13 August 2001 (see exhibit marked as "R2" of encl. 238).

So, the proceedings here have therefore been fully and finally adjudicated upon by the highest court in the country, namely, the Federal Court. It can readily be surmised that the respondent has exhausted all its avenues to challenge the winding-up order of 14 November 2000. The respondent has reached the end of the road. But the respondent saw it fit to file encl. 229 on 7 September 2001. This was about a month after the Federal Court had refused to grant

leave to the respondent to appeal. Enclosure 229 seeks to set aside a final *inter partes* Order that has been affirmed on appeal. Clearly it amounts to an abuse of the process of the court. The correctness of the winding-up order of 14 November 2000 has been fully litigated and can no longer be challenged by the respondent through encl. 229. I reiterate that the attempt in encl. 229 to have a second bite at the cherry, so to speak, after all the appeals have been exhausted is a classic example of an abuse of the process of the court. I refuse to exercise my discretion in favour of the respondent who is clearly abusing the process of the court.

It is not out of place to refer to some salient authorities pertinent to the issue at hand. For starters, I should refer to the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, a decision of the Court of Appeal. There the Court of Appeal dismissed the respondent's appeal against the winding-up Order. At p. 263 of the report, the Court of Appeal observed that the respondent has a history of questioning judgments after they are contested and entered and this constituted an abuse of the process of the court. The Court of Appeal also observed that the attempt to re-open a "cause" that had been disposed of to its finality constituted an abuse of the process of the court.

Next, it would be the case of *Hewlett Packard Sales (Malaysia) Sdn Bhd v. Active Team Mould Engineering Sdn Bhd & Ors* [2003] 5 CLJ 167, a decision of Vincent Ng J. There my learned brother rightly held that re-instatement is not accorded as of right but rather it is a matter of the court's discretion. His Lordship also said that the court ought not to exercise its discretion in favour of the party who is abusing the court's process. According to his Lordship, the merits of the matter to be re-instated is a relevant factor to consider. Indeed, in adjudicating encl. 255, I took into account that encl. 229 which is sought to be re-instated seeks to set aside the winding-up Order that was made *inter partes* and subsequently affirmed on appeal. Taken in its correct perspective, I hold and it is my judgment that encl. 229 is wholly devoid of any merits.

I will now refer to the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143, a decision of the Federal Court. In that case, the Federal Court held that the learned judge was *functus officio* and, consequently, the learned judge has no power under any application in the same action to set aside a judgment regularly obtained after it had been entered. The same would also be true to the present case at hand. Enclosure 229 can never succeed at all. It must be borne in mind that not only was the winding-up Order made after hearing the parties but it has also been affirmed on appeal.

Next, the case of *Hartecon JV Sdn. Bhd. & Anor. v. Hartela Contractors Ltd.* [1997] 2 CLJ 104, another decision of the Court of Appeal, should be referred to. That case concerned *res judicata* – the need for finality to judicial decisions. The Court of Appeal held that when a matter has been decided between two parties, the decision that is handed down is final when the appeal has been dismissed and that neither party will be allowed to canvass the matter again. Here, the winding-up Order has been granted and affirmed by the Court of Appeal on appeal. The application to the Federal Court for leave to appeal has also been refused. In regard to the question of whether the winding-up Order here ought to have been granted, this nagging question has been fully and finally adjudicated upon and can no longer arise.

Finally, the case of *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61, a decision of the Federal Court. There the Federal Court laid down the following germane principle of law: that the court will not decide academic issues which would not affect the position of one party or the other. Likewise here, it would be futile and meaningless for this court to re-instate and then hear encl. 229 because on settled principles the respondent can never succeed.

Not to be outwitted, the learned counsel for the respondent relies heavily on the following two cases:

(1) *Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd* [1996] 5 MLJ 127; and

(2) *Parasuraman a/l Kuppan v. Sazali bin Md Akhir & Anor* [1999] 4 CLJ 1, CA.

But, with respect, these two cases are poles apart from the case at hand. In Patricia Liew, the order in question had not been affirmed on appeal and the parties did not settle the dispute on the order in question pursuant to O. 42 r. 8 of the Rules of the High Court 1980 ("RHC"). Whereas in the present case, the order in question has been affirmed on appeal and counsel for the parties had on 3 January 2001, 7 February 2001 and 21 February 2001 appeared before the registrar to settle the dispute on the terms of the winding-up Order. The order was subsequently perfected as approved by the registrar.

In *Parasuraman*'s case, counsel did not seek an appointment for the dispute on the order in question to be determined pursuant to O. 42 r. 8 of the RHC. Here, as stated above, counsel for the parties appeared on three occasions before the registrar to settle the dispute in regard to the terms of the winding-up Order.

The respondent should not be allowed to abuse the process of this court with impunity. Enclosure 255 is doomed to fail from the very outset and it must be dismissed with costs. I make those orders accordingly and I too close this file forthwith.